Supreme Court, U. S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,
Petitioners,

v.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 29, 1980.

STATEMENT OF QUESTIONS PRESENTED

I.

Whether Congress, in enacting 42 U.S.C. § 1988, intended to abolish the doctrine of judicial immunity with respect to judicial officers who are charged with committing civil rights violations while acting in their judicial capacities, thus subjecting judges to liability for attorney's fees; if Congress did so intend, whether it had the power under the Constitution of the United States to create such liability.

II.

Whether plaintiffs may recover attorney's fees under 42 U.S.C. § 1988 where they, in fact, incurred no fees in their civil rights action and no public policy will be advanced by the award.

III.

Whether the plaintiffs in a civil rights action can be deemed "prevailing parties" for purposes of 42 U.S.C. § 1988

where the plaintiffs stipulate to the dismissal of the action as moot, the order dismissing the case expressly omits a finding of any wrongdoing by the defendant judicial officers, and the record does not contain evidence of a causal relationship between the suit and the circumstances which gave rise to the dismissal for mootness.

IV.

Whether attorney's fees may be awarded under 42 U.S.C. § 1988 against a State or state agency where neither the State nor the state agency was a party to the underlying suit, neither was given notice of an intention to seek to charge them with liability for attorney's fees, and neither has had an opportunity to be heard in opposition to an award of fees.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania, the Honorable William W. Knox, at No. 78-267 dated May 24, 1979, a copy of which is included in the Appendix, is not officially reported.

The opinion of the United States Court of Appeals for the Third Circuit, at No. 79-1923 dated July 29, 1980, a copy of which is included in the Appendix, is not yet officially reported.

STATEMENT OF JURISDICTION

1. The Order of the United States Court of Appeals for the Third Circuit dated July 29, 1980, from which this Petition for Certiorari is taken, was entered on July 29, 1980.

2. The Supreme Court of the United States is authorized to hear the appeal in this case by 28 U.S.C. § 1254(1) (1976).

STATEMENT OF CONSTITUTIONAL PROVISIONS AND LAWS

Federal

U. S. Const. art. IV, § 4

U. S. Const. amend. XI

28 U.S.C. § 1291 (1966)

29 U.S.C. § 216(b) (1970)

29 U.S.C. §§ 621-634 (1975)

42 U.S.C. § 2809 (1973)

42 U.S.C. § 1983 (Supp. 1980)

42 U.S.C. § 1988 (Supp. 1980)

State

Pa. Const. art. V, § 1

Pa. Const. art. V, § 10

Pa. Const. art. V, § 18

The Public Welfare Code, Act of June 13, 1967, P. C. 31 (62 P.S. § 101 et seq.)

42 Pa. C.S. § 1901 et seq. (1980)

Code of Virginia § 54-48 (1950)

STATEMENT OF THE CASE

This case involves liability for attorney's fees under The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (Supp. 1980) ("§ 1988"). The principal question is whether, as the district court herein held, judicial officers of a state are protected by the doctrine of judicial immunity from liability for fees where the act or omission complained of was done in the judicial capacity of such officer, or whether, as the circuit court held, judicial immunity has no place in a proceeding under § 1988.

Procedural Background (the suit under § 1983)

On March 10, 1978, the plaintiffs filed a Complaint in the District Court of the United States for the Western District of Pennsylvania for declaratory and injunctive relief against nine district justices of Beaver County, Pennsylvania, the petitioners herein. The plaintiffs were represented by attorneys from the

Neighborhood Legal Services Association.[1] The complaint averred the plaintiffs were indigent defendants in criminal proceedings before the district justices, and had been sentenced to prison by them after hearings in which the defendants had not been represented by counsel or informed of their right to counsel, all in violation of the Constitution of the United States as interpreted by the United States Supreme Court in Argersinger v. Hamlin, 407 U.S. 25 (1972). The complaint requested declaratory and injunctive relief under 42 U.S.C. § 1983 (Supp. 1980) ("§ 1983") and was in the form of a class action under Fed. R. Civ. P. 23.

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[1] Neighborhood Legal Services Association is an organization created to render legal services to indigent persons pursuant to the Social Security Act, 42 U.S.C. § 2809 (1973) and Article IV of the Public Welfare Code, Act of June 13, 1967, P.L. 31 (62 P.S. § 101, et seq.)

On April 7, 1978, the district justices filed a motion to dismiss the complaint on the ground that the district court should abstain from the case. The motion was signed by the attorney for the district justices, who was a Philadelphia lawyer on the staff of the Court Administrator of Pennsylvania.[2] The motion to dismiss was denied by an order entered May 31, 1979.

Thereafter, the plaintiffs moved to maintain the action as a class action, for leave to file an Amended Complaint, and for a preliminary injunction. At the time fixed for argument on the class action issue, the court instead held a status conference. On this occasion, with the encouragement of the district court, the parties agreed that the dispute between them could probably be

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2 Later, on June 15, 1978, the additional appearance of a Beaver County, Pennsylvania, lawyer was entered for the district justices.

settled.[3] [53a-54a; 59a-62a].

On October 18, 1978, the district justices filed a "Motion to Dismiss Due to Mootness", alleging that the district justices were complying with Argersinger, supra, and with the Pennsylvania Rules of Criminal Procedure designed to implement that decision;[4] that indigent defendants before the district justices of Beaver County were being afforded legal counsel by the Public Defender of Beaver County; and that the issues set forth in the complaint were moot.[5] [63a-69a]. The motion was unopposed,

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3 Bracketed citations throughout this Statement of the Case refer to pages in the appendix which was filed by respondents in the Court of Appeals.

4 See Pa. R. Crim. P. 65, 316 and 318.

5 The plaintiffs' answer to the motion, while admitting the factual averments, disavowed any implication in the motion that past violations had not occurred.

and on October 20, 1978, the district court entered an order dismissing the complaint for mootness. [72a]

Attorneys' Fees Award Proceedings (the claim under § 1988)

The present stage of this case commenced on December 11, 1978, when the plaintiffs filed a motion for costs and attorneys' fees pursuant to § 1988.[6] The motion contained no indication of the party or parties from whom the fees were sought. [73a-79a].

On March 27, 1979, a hearing was held on the motion, at which testimony was given by a lawyer on the staff of Neighborhood Legal Services Association, who had acted as attorney for plaintiffs in the § 1983 proceeding. He testified to the alleged

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6 The Civil Rights Attorneys' Fees Awards Act of 1976 amended 42 U.S.C. § 1988 to provide in relevant part: "In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

derelictions which led to the filing of the complaint and to the developments which led to the motion to dismiss for mootness. [99a-110a] He stated that subsequent to the entry of the order dismissing the case, he personally knew of only one problem concerning Argersinger. [105a] The district justices stipulated to the reasonableness of the amount of fees requested and submitted no evidence in opposition to the motion. [117a-118a]

On May 24, 1979, the district court entered a Memorandum Opinion and Order denying the motion for attorney's fees. The court's order was based primarily on the doctrine of judicial immunity:

> We hold in this case that discretion should be exercised not to award counsel fees against members of the state judicial system who have no funds from which to pay it other than funds of their office, that to do so would undermine the whole reasoning against [sic] judicial immunity and inhibit them in the exercise of their official functions as judges for fear of possible payment of counsel fees and possible lawsuits. [128a]

In its Memorandum Opinion the district court gratuitously observed that the plaintiffs were the prevailing parties.

The plaintiffs took a timely appeal to the Court of Appeals for the Third Circuit. Jurisdiction of the appeal existed pursuant to 28 U.S.C. § 1291 (1976). On July 29, 1980, that Court reversed the decision of the district court, ruling that "judicial immunity is not a factor to be considered under § 1988." Slip opin. at 8. The court also rejected the defendants' alternative positions in support of the district court's order denying the application for fees.[7] The case was remanded to the district court for a determination of who should be directed to pay the award of fees, and for the entry of a proper decree.

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[7] The alternative grounds for affirmance of the district court's order of dismissal are discussed in parts II, III and IV of this petition, infra.

The district court was authorized, if it saw fit, to give further consideration to the reasonableness of the amount of fees claimed, notwithstanding that this had not been an issue in the trial court. A stay of the Circuit Court's mandate has been obtained to allow the filing of this Petition for Certiorari.

ARGUMENT

I.

The Doctrine of Judicial Immunity Bars an Award Against Judges for Attorney's Fees Under 42 U.S.C. § 1988.

The doctrine of judicial immunity to suit because of acts or omissions in the course of a judge's official duties is firmly rooted in the common law. See, e.g., Bradley v. Fisher, 13 Wall. 335 (1872). The doctrine has been applied many times in litigation under the Civil Rights Act, 42 U.S.C. § 1983. See Pierson v. Ray, 386 U.S. 547 (1967); cf. Owens v. City of Independence, 444 U.S. 822 (1980). See also Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), cert. denied, 386 U.S. 1021 (1967) and cases collected therein at 586 n.7. In Bauers the Court of Appeals for the Third Circuit, arguing from this Court's opinion in Tenney v. Brandhove, 341 U.S. 367 (1951), held that the conclusion was "inescapable" that § 1983 "was not intended to be in derogation of the common law", id. at 588, and so expressly overruled its contrary decision

in Picking v. Penna. R.R., 151 F.2d 240 (3d Cir. 1945). At issue in the present case is whether by enacting the Attorneys' Fee Awards Act of 1976, 42 U.S.C. § 1988 (Supp. 1980) ("§ 1988"), as an aid to the vindication of civil rights protected by 42 U.S.C. § 1983 (Supp. 1980) ("§ 1983"), Congress intended to abrogate the judicial immunity doctrine with respect to fee awards.

This question -- whether a judicial officer acting in a judicial capacity may be saddled with a civil rights plaintiff's legal fee -- is one of obvious importance; it affects the very foundation of the judicial system of this country -- the basic independence of our judges. This Court has not yet decided the issue, although it was adverted to in the recent decision in Supreme Court of Virginia v. Consumers Union of the United States, _____U.S._____, 100 S. Ct. 1967 (1980). The opinion in that case is instructive in the present context.

In Consumers Union, the district court determined that the rule which prohibited attorney advertising contained in the Virginia Code of Professional Responsibility (State Bar Code) violated § 1983. The court therefore issued an injunction against the Supreme Court of Virginia restraining that court from enforcing the offending rule. On a subsequent application pursuant to § 1988, the district court awarded attorneys' fees to the plaintiffs against the justices of the Virginia Supreme Court in their official capacities.

On appeal this Court examined the peculiarities of the Virginia State Bar Code and noted that by Section 54-48 of the Code of Virginia (1950), "the State has vested in the Court virtually its entire legislative or regulatory power over the legal profession." _____U.S. at _____, 100 S. Ct. at 1969. The Court concluded that the Virginia Supreme Court, in promulgating its rules under the Code, had acted in a legislative capacity. "[P]ropounding

the [State Bar] Code was not an act of adjudication but one of rulemaking." _____U.S. at _____, 100 S. Ct. at 1974. Under this Court's earlier decisions, it had been established that the doctrine of legislative immunity barred suits under § 1983 for acts taken in a legislative capacity, whether the relief sought was injunctive in nature or an award of damages. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Dombrowski v. Eastland, 387 U.S. 82 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951). The Court in Consumers Union thus held that "the Virginia Court and its members are immune from suit when acting in their legislative capacity", _____U.S. at _____, 100 S. Ct. at 1975, and that an award of attorney's fees under § 1988 could not be "premised on acts or omissions for which appellants enjoyed absolute legislative immunity." _____U.S. at _____; 100 S. Ct. at 1978.

In addition to legislative functions

relative to the governance of the legal profession, the Virginia statute conferred upon the Supreme Court of Virginia responsibility for the enforcement of its rules concerning lawyer conduct. With respect to this function, this Court held that legislative immunity did not apply, and that the Virginia Supreme Court justices were subject to suit under § 1983 in their official capacities for actions taken by way of enforcement of such rules. By the same token, the Court stated that an award of attorneys' fees premised on enforcement activities would also have been proper. Since, however, the district court had based its award of attorneys' fees on the Virginia court's legislative activities, this Court vacated the fees award and remanded the case for further proceedings.

In light of this disposition, it was unnecessary for this Court to decide whether judicial immunity bars an action for prospective relief under § 1983 or for attorneys' fees under § 1988 against a judge

acting in his judicial capacity. These questions were therefore specifically reserved. _____U.S. at _____, 100 S. Ct. at 1976.

The case at bar squarely raises the question whether judicial immunity bars an award of attorneys' fees under § 1988.[8] There can be no question that the alleged acts or omissions of the district justices upon which an award would be based -- failure to warn criminal defendants that they were entitled to be represented by counsel, and that, if the defendants were indigent, counsel would be supplied free of charge to them -- were judicial acts or omissions within the jurisdiction of the judicial officers

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8 This question did not arise at the § 1983 stage of this case; the suit under that section was dismissed as moot before trial, and the defendant justices had not raised the immunity defense at that time. It was raised at the later § 1988 stage of the case, and was the basis of the district court's decision.

who made them.[9]

We earnestly submit that this Court should issue a writ of certiorari in this case to answer the question which was raised but not decided in Consumers Union, and which has now been decided by the Third Ciucuit. To leave the issue undetermined by this Court will result in continued uncertainty and substantial harm to the judicial system as judges are forced to make decisions under the ever-present threat of suits and subsequent fee requests.

A. Judicial Immunity

In Bradley v. Fisher, supra, the defendant was a justice of the Supreme Court of the District of Columbia who had presided over the trial of John H. Suratt, who was accused of having murdered President Lincoln. At the conclusion of the trial, the judge ordered the name of the defendant's attorney

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9 The District Justices of Pennsylvania are judicial officers. Pa. Const. art. V., § 1.

stricken from the rolls of those permitted to practice before the court.

The lawyer sued the judge for damages; the defense was judicial immunity. After the lower court refused to admit all of the evidence proffered by the plaintiff, the plaintiff appealed. This Court held that the judge was protected from liability for damages by virtue of judicial immunity. The importance of that immunity was said to inhere in the functions which it performed. First, said the Court, immunity ensures that a judge is "free to act upon his own convictions, without apprehension of personal consequences to himself." 13 Wall. at 347. Second, immunity serves to protect judges from harassing and vexatious litigation.

The Court in Bradley made it clear that immunity from suit did not mean that erring judges could not be disciplined. On the contrary, the Court explained:

> In this country the judges of the superior courts of record

> are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. . . .
>
> * * *
>
> [F]or malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other forms as may be specially provided.

13 Wall. at 350, 354.

Almost a century later, in Pierson v. Ray, 386 U.S. 547 (1967), this Court considered whether Congress had intended to abrogate the common law doctrine of judicial immunity with respect to liability for damages under § 1983. In words which have significant import for this case, the

Court rejected such a notion:

> Accordingly, this Court held in Tenney v. Brandhove, 341 U.S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

386 U.S. at 554-55.

To permit an award of attorneys' fees against a judge under § 1988 would also frustrate the purpose of judicial immunity by weakening the independence of judges and by exposing judges to harassment. The arguments to the contrary rest on two fictions:

(1) The fiction that attorneys' fees are not damages.

Under § 1988, attorneys' fees can be awarded "as costs." Nevertheless, unlike customary and traditional litigation costs, attorneys' fees can be substantial. This proposition needs no documentation, especially in the context of a class action. The potential severity and consequences of an award of counsel fees are not one whit

lessened by application of the label "costs." The threat to a judge of such a penalty is particularly dangerous where one of the parties in the original suit before the court is more likely than the other party to seek relief against the judge, as, for example, where the case pits a private person against some arm of government. The slightest subconscious fear of suit because of judicial error or oversight can play subtly on a judge's decision.

This threat is also present in cases where the issues are very close, and irrelevant pressures might mean the difference in the way the judge decides. The role of the immunity doctrine in helping to achieve total impartiality in difficult cases was emphasized by this Court in Bradley v. Fisher, supra:

> Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence

> and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge.

13 Wall. at 348.

This Court recognized the potential problem of including non-traditional litigation expenses in the category of costs in Hutto v. Finney, 437 U.S. 678 (1978). In that case, the Court held that the Eleventh Amendment to the Constitution of the United States did not bar an award of attorney's fees under § 1988 against state prison officials acting in their official capacities.[10] The Court explained

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[10] The Court in Hutto was concerned with two distinct awards of attorney's fees. The first was for legal services rendered at the trial level, and was made (prior to the 1976 amendment to § 1988) pursuant to a court's "unquestioned power to award attorney's

(FOOTNOTE 10 CONTINUED)

that assessment of costs against state officials had traditionally been made without reference to the Eleventh Amendment. The Court acknowledged, however, that the definition of costs could not be expanded to permit the wholesale imposition of staggering financial burdens on the States: "[W]e do not suggest that our analysis would be the same if Congress were to expand the concept of costs beyond the traditional category of litigation expenses." 437 U.S. at 697 n. 27.

The fictional character of imposing attorney's fees as legitimate costs of litigation is particularly apparent in this case, where the plaintiffs were represented by a law organization which receives funding

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FOOTNOTE 10 CONTINUED

fees against a party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order." 437 U.S. at 689 n.14. The second award was for legal services rendered on appeal and was made pursuant to § 1988, which was enacted during the pendency of the lawsuit.

from the federal government and from the Commonwealth of Pennsylvania, and the plaintiffs incurred no legal fees. There is thus no element of reimbursement in any award, which must be equated to damages or a penalty.[11]

The purposes served by the doctrine of judicial immunity are, of course, different from those served by the Eleventh Amendment, and, therefore, Hutto is not controlling here. Judicial immunity preserves the independence of judges and protects them from harassment. The imposition of attorney's fees on judges would defeat these purposes to no less a degree than would the imposition of damages.

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[11] In Part II, infra, the argument is made that § 1988 does not apply where no legal fees are incurred.

(2) The fiction that the imposition of attorney's fees on judges will not affect their independence or result in harassment because the governmental units which they serve will actually pay the awards

Under Hutto v. Finney, supra, awards against state officials in their official capacities are to be paid by the states.[12]

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[12] The case at bar permits this Court to reexamine part IIB of its opinion and decision in Hutto v. Finney, 437 U.S. 678 (1978), should it desire to do so. That portion of the Court's opinion caused sharp division in the Court. The petitioners in this case, appellees below, did not, of course, ask the Third Circuit Court of Appeals to overrule the Supreme Court's decision in Hutto. Nonetheless, the issue was touched upon in the briefs below, and the Court of Appeals did confront the question: "Moreover, contrary to some suggestions in the briefs, the eleventh amendment is not a bar to an award of attorney's fees under § 1988 (citing Hutto)." Slip opin. at 6. The case at bar presents the question of Eleventh Amendment immunity at a more advanced stage than Hutto, since in argument in the Court of Appeals the respondents seem to have singled out a particular state agency (the Administrator of the State Courts) which they believe should be responsible for an award. Neither they nor the Court of Appeals, however, are definite in this regard, and both would find an award against other repositories of state funds equally satisfactory. As discussed in part IV of this petition, infra, an award against any state agency without notice or opportunity to be heard raises important questions of due process as well as questions involving the Eleventh Amendment.

Therefore, argued respondents in the Court of Appeals, judges would not be affected in their decisions on the merits by the prospect of a possible future suit and an award of attorney's fees.

We submit, however, that the notion that a judge's independence would be assured because his public employer would pay the award brought about by his mistake or misconduct is a cynical one, to say the least. No conscientious jurist could be comforted by the fact that the citizens of a state which he serves would have to pay for his dereliction. As observed above, this is especially true where the judge knows, consciously or subconsciously, that a decision against one party is much more likely to result in a suit and subsequent fee request than would a decision against the other party.[13]

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13 Furthermore, freedom from payment of the ultimate fee award does not forestall harassment in the form of the lawsuit itself.

(FOOTNOTE 13 CONTINUED)

FOOTNOTE 13 CONTINUED

Judicial immunity was not raised in the district court as a defense to the § 1983 action for prospective relief, and in fact no prospective relief was awarded. Therefore, this case does not strictly raise the question whether judicial immunity bars suits for prospective relief against judges. The decision in the circuits are in conflict. Compare Williams v. Williams, 532 F.2d 120 (8th Cir. 1976); Cheramie v. Tucker, 493 F.2d 586 (5th Cir.), cert. denied, 419 U.S. 868 (1974); Mirvin v. Justices of the Supreme Court of Nevada, 415 F. Supp. 1178 (D. Nev. 1976), with Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979), cert. denied, 445 U.S. 938 (1980); Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975); Heimbach v. Village of Lyons, 597 F.2d 344 (2d Cir. 1979); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

Supreme Court of Virginia v. Consumers Union of the United States, _____U.S._____, 100 S.Ct. 1967 (1980), contains intimations that an award of attorney's fees is barred by immunity doctrines only if prospective relief is so barred. Petitioners contend that this conclusion does not necessarily follow from the premise. As discussed throughout this portion of this petition, there exist good reasons for barring awards of attorney's fees which do not apply to awards of prospective relief.

Petitioners would contend, however, that the doctrine of judicial immunity bars suits for prospective relief. The contrary decision permits harassment of judges and forces judges to take precious time from their judicial duties to defend the lawsuits against them. The considerations which led this Court to conclude in Consumers Union that legislative immunity bars suits against legislators for prospective relief apply equally to judicial immunity. See Pierson v. Ray, supra.

Moreover, the argument that the purpose of immunity is achieved because the district justices might not personally have to pay a fee award would apply equally to an award of damages. But public policy considerations do bar a judgment for damages against a judge, regardless of his personal obligation to pay the amount of the judgment, and the same considerations should bar an award of attorney's fees also.

B. The Legislative History of § 1988

The Court of Appeals concluded that Congress intended to abrogate judicial immunity as a defense to an action under § 1988. The Court believed that this conclusion was compelled by the inclusion of a citation to Pierson v. Ray, 386 U.S. 547 (1967), in a footnote in the House Committee Report relating to § 1988. In so ruling, we respectfully submit, the Court below erred.

The relevant portion of the text of H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. at 9, (hereinafter "House Report") is to

be found in a passage dealing with the element of "reasonableness" of fees to be allowed to prevailing parties, and is as follows:

> [W]hile damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. . . .

Footnote 17 consisted solely of three case citations, viz., Wood v. Strickland, 420 U.S. 308 (1975), Scheuer v. Rhodes, 416 U.S. 232 (1974), and Pierson v. Ray, supra. Wood v. Strickland and Scheuer v. Rhodes deal primarily with questions of official (non-judicial) immunity. Pierson v. Ray deals both with the immunity of a municipal judge from suit for damages under § 1983 (this Court reaffirming such immunity) and with the

special defenses available to police officers in a § 1983 suit (this Court holding that the defenses of good faith and probable cause to arrest are available).[14]

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[14] Pierson v. Ray arose when black civil rights leaders intentionally entered segregated facilities for whites in Jackson, Mississippi. They were arrested by police and convicted by a municipal police justice for causing a disturbance of the peace. During a trial de novo in the general trial court, one of the accused was granted a directed verdict, and the cases were dropped against the other defendants.

Subsequently, the defendants brought actions against the arresting officers and the municipal police justice for damages under § 1983. A jury trial resulted in a verdict for the defendants, and judgments were entered on the verdicts. On appeal, the Court of Appeals for the Fifth Circuit held that the municipal judge was protected from suit by judicial immunity. The Court also held that the police officers were not entitled to the common law defenses of good faith and probable cause.

Accepting the case on certiorari, this Court affirmed the decision of the Court of Appeals that the municipal judge was immune from suit. As to the police officers, however, this Court held that the defenses of good faith and probable cause were available to them in actions under § 1983.

Since Pierson v. Ray is the only case of the three cited which deals with the doctrine of special defenses, we think it logical to conclude that Pierson v. Ray was cited in the footnote as an example of cases affording the "special defenses" referred to in the quoted passage, rather than for its holding on judicial immunity. In any event, there is no basis for concluding that the footnote indicates a Congressional intent to abrogate judicial immunity.[15]

In short, the court of appeals, basing its decision upon nothing more than an ambiguous footnote in a report of the House of Representatives, leaped to the conclusion that judicial immunity had been abrogated in this class of cases. Before a doctrine so fundamental to our system

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15 The court of appeals seemingly found significance in the citation to Pierson v. Ray in that this Court there held that Congress had power to abrogate judicial immunity. The citation was taken to indicate that "Congress has exercised the choice left to it by Pierson in enacting § 1988." Slip opinion at 7-8.

of jurisprudence is jettisoned, the policy considerations discussed above should at least be considered.[16]

C. Constitutional Considerations

In Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), cert. denied, 386 U.S. 1021 (1967), the Court of Appeals raised an important question which must be answered before § 1988 can be construed to have abrogated judicial immunity. The court noted that judicial immunity is inherent in the concept of an independent judiciary, and that an independent judiciary, in turn, is essential to the republican form of government. A republican form of government is guaranteed to every State in Art. IV, § 4 of the Constitution of the United States. Any statute which abrogates

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16 "[I]t is well settled that a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment." Bauers v. Heisel, 361 F.2d 581 at 587 (3d Cir. 1966), cert. denied, 386 U.S. 1021 (1967).

judicial immunity, therefore, may have thereby violated the Guarantee Clause, and be unconstitutional.

Although the Court of Appeals in Bauers v. Heisel, supra, noted this difficult question, the same court in the present case ignored the problem. Instead, as above noted, the court concluded without discussion that the Supreme Court had decided in Pierson v. Ray, supra, that Congress has the power to abolish judicial immunity. This conclusion, we submit, was unwarranted in light of the strong support which Pierson v. Ray itself supplies for the inviolability of the doctrine of judicial immunity, whether with respect to suits for damages or for equitable relief, and in view of the express reservation of the immunity question in Consumers Union, supra.

II.

No Justification Exists in this Case for Allowing an Award of Attorney's Fees to Litigants who did not Actually Incur any Fees.

The plaintiffs in this case were represented by an attorney from a publicly funded law firm which renders legal services to indigent people, and which receives all of its funding from the Commonwealth of Pennsylvania and the federal government. It is not claimed that either he or Neighborhood Legal Services charged the plaintiffs anything whatever for their services; thus plaintiffs are neither out-of-pocket or in debt for any attorneys' fees. Nevertheless, the Court of Appeals held that a fee award is proper, relying on its decision in Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978). We have serious question as to the correctness of this aspect of the Rodriguez decision, but in any event submit that reliance on it in the present case is misplaced.

In Rodriguez, the plaintiff, a victim of age discrimination in his quest to become a security officer for the City of Philadelphia, was represented by attorneys from Community Legal Services, Inc., (the Philadelphia counterpart of Neighborhood Legal Services) in prosecuting a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-634 (1975). The trial court awarded attorneys' fees based on 29 U.S.C. § 626(b) (1975) and 29 U.S.C. § 216(b) (1970), which provide: "The court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant." (Emphasis supplied.) On appeal, the Court of Appeals noted the mandatory language of the statute and held that neither federal law nor its own charter barred Community Legal Services from obtaining an award of fees.

Two justifications were offered by the Court of Appeals for its decision in Rodriguez, but even if valid in the context

of that case, and this is questionable, neither is apposite here. First, the court noted that such awards act as a deterrent to future misconduct. A deterrent is not needed or meaningful, however, where, as here, the alleged civil rights violations by the defendants are not shown to be intentional or in bad faith. Moreover, as noted previously, here the original suit under § 1983 was never brought to trial, but was dismissed as moot on the ground that the practice complained of would not, in any event, recur.[17]

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17 Deterrence as a reason for a counsel fee award seems particularly inappropriate where judicial officers are concerned. As Bradley v. Fisher, supra, noted, such officers are appropriately to be disciplined by way of impeachment "or such other form as may be specially prescribed." 13 Wall. at 354. In Pennsylvania the remedy of impeachment has been supplemented, if not supplanted, by proceedings before a constitutionally created Judicial Inquiry and Review Board. Pa. Const. Art. V., § 18. See also Rules of Procedure for the Judicial Inquiry and Review Board, promulgated by the Supreme Court of Pennsylvania, June 27, 1969, 434 Pa. lxxxii; Desk Copy, Pennsylvania Rules of Court 87 (West, 1980); Annual Report of the Judicial Inquiry and Review Board for 1978, as contained in the Report of the State Court Administrator for 1978. Furthermore,

(FOOTNOTE 17 CONTINUED)

Second, the court in Rodriguez reasoned that awarding fees to public interest law firms would permit them to engage in more litigation to vindicate the policies of the Age Discrimination in Employment Act. This may be a proper consideration when applied to an employer-defendant under that statute, but it is totally without merit when the claim for fees is against a state judicial officer or a state government or an arm thereof; the government, like the public interest law firm, is in the business of providing services to the public and is also limited in its available resources. These resources must be budgeted among various Commonwealth agencies, including the

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FOOTNOTE 17 CONTINUED

the conduct of district justices such as the petitioners in this case is further regulated by the Rules Governing Standards of Conduct of Justices of the Peace promulgated by the Pennsylvania Supreme Court on February 1, 1973, 450 Pa. xxix, Pennsylvania Rules of Court, supra, at 63. Rule 17 of said rules provides that president judges of courts of common pleas shall exercise general supervision and administrative control over justices of the peace within their judicial districts.

agency which funds the Neighborhood Legal Services Association, by whom the plaintiffs' attorneys are employed.

An award in this case, presumably, would result in a smaller budgetary allocation from the Commonwealth of Pennsylvania to Neighborhood Legal Services next year. Thus, the only accomplishment of an award would be to embarrass the judges on whose conduct the award is based, to make them more sensitive to the dangers of ruling against clients of Neighborhood Legal Services in future cases, and to engender a needless and wasteful recycling of public monies.

In conclusion on this aspect of the case, it must be emphasized that the Civil Rights Attorneys' Fees Awards Act of 1976 is, in the words of the Senate Report, "designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the Civil Rights Acts. . . . [F]ee awards have proved an essential remedy if private

citizens are to have a meaningful opportunity to vindicate [congressional policies in these acts]." S. Rep. No. 94-1011, 94th Cong., 2d Sess., 1976 U. S. Code Cong. & Admin. News 5908, 5909-10 (hereinafter "Senate Report"). There then appears the following paragraph which we quote in full:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the laws has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Senate Report, supra, at 5910. (Emphasis supplied.)

It is clear that an award of fees under § 1988 is intended as a "remedy," where needed, to allow suit to be brought; it is intended to reimburse the prevailing plaintiff; it is not intended to compensate a lawyer or agency whose duty it is to represent and who does represent a plaintiff

without charge; it is not intended to give a windfall to a litigant who has not incurred counsel fees or the threat of fees in his quest for vindication. Finally, it should not be overlooked that relief under § 1988 is discretionary with the court, whereas the statute in Rodriquez, supra, mandates an allowance of fees. The concluding portion of the Senate Report cites cases in other types of federal litigation in which counsel fees have been awarded. "These cases", says the report, "have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." Senate Report at 5913. Substantially the same language is to be found in the House Report at 9. In the instant case, no fee award is necessary to attract competent counsel and § 1988 is not applicable. Since vindication of their rights costs nothing, respondents need "no opportunity to recover what it costs them." Senate Report, supra, at 5910.

Because the Court of Appeals has decided an important and recurring question under § 1988 through misplaced reliance on a decision construing another, differently worded, statute and in a way which, we submit, distorts the purpose of § 1988, we believe this Court should address the issue.

III.

The Plaintiffs were not Prevailing Parties and are Therefore Not Entitled to an Award of Attorneys' Fees.

Under § 1988, a court may award attorneys' fees only to a "prevailing party". This phrase has been the subject of considerable recent interpretation, and the clear weight of authority holds that a party need not obtain a verdict in his favor in order to be deemed a "prevailing party" for purposes of § 1988. Thus this Court held recently that § 1988 does not condition a court's power to award fees "on full litigation of the issues or on a judicial determination that the plaintiff's

rights have been violated"; a plaintiff who prevails "through a settlement rather than through litigation" is entitled to § 1988 relief, Maher v. Gagne, _____U.S._____, _____, 48 U.S.L.W. 4891, 4893 (1980). This Court indicated last Term, however, that qualification as a prevailing party would not lightly be assumed. Hanrahan v. Hampton, _____U.S._____, 48 U.S.L.W. 3780 (1980).

The test adopted by the Third Circuit Court of Appeals for determining whether a party is a "prevailing party" (with which we have no quarrel) is whether he "fairly can be found by the district court to have essentially succeeded on such claims. . . ." Hughes v. Repko, 578 F.2d 483, 487 (3d Cir. 1978). See also Swietlowich v. County of Bucks, 620 F.2d 33 (3d Cir. 1980); Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979).

Beyond the "essentially succeeded" requirement, however, it seems fairly clear that "prevailing party" status presumes a

causation element; that is, there must be a causal connection between the bringing of the civil rights suit and the obtaining of the relief. Foster v. Boorstin, 561 F.2d 340 (D.C. Cir. 1977); Tobeluk v. Lind, 589 F.2d 873 (Alas. 1979). In this case, the record simply does not contain sufficient evidence to allow the conclusion of the courts below that the causative element was present.

In the first place, the case charging infringement of the plaintiffs' civil rights was never tried, and it was therefore never established as a fact in the § 1983 proceeding that the district justices were guilty of the misconduct alleged. The justices in their sworn answers to the complaint had denied each such charge. This became an academic matter, however, for the parties agreed that -- whether or not there had been past violations -- in September of 1978 Argersinger and the Pennsylvania rules of conduct were being followed, and that

the case was moot. In the second place, assuming that the misconduct had taken place as alleged, claimants seeking an award of fees must have some burden of proof to show their entitlement; that is, to show that the bringing of the suit was the cause of cessation of the misconduct. Cf. Cicero v. Olgiati, 473 F. Supp. 653 (S.D. N.Y. 1979). This the present plaintiffs did not do, and the courts below erred in holding the contrary.

The facts concerning the plaintiffs' § 1983 claim are not well developed in the record.[18] From colloquy of counsel at the § 1983 status conference, it appears that during the pendency of the suit, an independent case came before Judge Rowley of the Court of Common Pleas of Beaver County. The evidence in that case indicated that a district justice had violated Argersinger and the Pennsylvania Rules of Criminal

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18 The only evidence in the entire record is the testimony of plaintiffs' attorney on the § 1988 issue of fees [98a, et seq.].

Procedure in not giving the constitutional warnings as to right to counsel. Judge Rowley set aside the summary conviction which had been entered by the district justice. [48a-49a] Thereupon, Judge Sawyer of the Court of Common Pleas of Beaver County issued a memorandum to district justices in his district (the instant petitioners) directing them to comply with the relevant Pennsylvania rules. [49a] On the basis of Judge Rowley's opinion and Judge Sawyer's memorandum (which is not of record in this case), the Plaintiffs agreed to the dismissal of their lawsuit for mootness. [70a-71a] There is no evidence in the record of any connection between Judge Rowley's opinion and Judge Sawyer's memorandum on the one hand and the Plaintiff's lawsuit on the other.

The district court's conclusion that the plaintiffs had prevailed was purely obiter dictum, unnecessary to its immunity holding and unsupported by any stated

rationale. We respectfully submit that the Court of Appeals was mistaken when it ruled that the record supports the district court's dictum.

The concept of "prevailing party" is central to the remedy afforded by § 1988. The problems of causation and burden of proof in order to qualify a party as "prevailing" are important to the proper adjudication of fee claims by the federal courts. Because the lower courts in this case gave short shrift to the problem, and in light of the plethora of cases involving the prevailing party requirement in § 1988 claims, a clarifying decision by this Court is desirable.

IV.

Considerations of Due Process and Fairness Prohibit an Award Against the State or State Agency without Giving it Notice or an Opportunity to be Heard.

After holding that an award of counsel fees was proper in the case at bar, and noting that on appeal an award

was sought against petitioners only in their official capacities, the Court of Appeals stated that the district court could fix liability for the payment of the fees upon the Commonwealth of Pennsylvania or the Administrator of the Pennsylvania Courts or the county court administrator.

> Here, as in Hutto [v. Finney, supra,] and Skehan, [v. Board of Trustees of Bloomsburg State College, 590 F.2d 490 (3d Cir. 1978), cert. denied, 444 U.S. 832 (1980)] there are several possibilities as to how the award could be framed. For example, both the county and the state court administrator arguably could be responsible for the award. Both entered appearances in the district court and actively participated in all phases of the case, factors found to be relevant in Hutto in framing an award.

Slip opinion at 7-8.

Since this statement is an integral part of the decision of the Court of Appeals that petitioners are subject to § 1988,

and since on this record the statement is plainly erroneous, petitioners are within their rights in advancing it as an additional reason for this Court to grant this petition.

The Court of Appeals' position was apparently bottomed on this Court's decision in Hutto v. Finney, 437 U.S. 678 (1978). There this Court held that the Department of Correction of the State of Arkansas could be compelled to pay an award of attorney's fees under § 1988 against officials of that state's prison system. The Court also stated that Arkansas could be liable for appellate attorney's fees although the state was not a formal party to the appeal. 437 U.S. at 699-700. These holdings, however, were premised on the conclusion that the action was, for all practical purposes, brought against the State of Arkansas. The State Attorney General defended the case from its beginning; the State had paid earlier fee awards; and it was the State's lawyers who decided to

bring the appeal.

In the present case, the Commonwealth of Pennsylvania and the Attorney General of that state have had nothing whatever to do with the action.[19] Contrary to the above quoted statement contained in the opinion of the Court of Appeals (slip opinion at 8), neither the administrator for the Court of Common Pleas of Beaver County, Pennsylvania, nor the State Court Administrator entered appearances in the district court and neither participated in any phase of the case. Presumably as a courtesy, the Administrator of the Pennsylvania State courts and the administrator of the Beaver County courts provided the district justices with lawyers from their offices. The lawyers entered their appearances as attorneys for the district justices, not as attorneys

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19 The Attorney General of Pennsylvania takes the position that it would violate the Pennsylvania Constitution's provision for separation of powers for the Attorney General to represent members of the state judiciary. Pa. Atty. Gen. Op. 75-9 (1975).

for the court administrators.

The State Court Administrator in Pennsylvania is a constitutional officer and his office is created by state statute. See Pa. Const., Art. V, § 10; 42 Pa. C.S. § 1901, et seq. The functions of the Administrator's office are limited to those stipulated by the Supreme Court in its Rules of Judicial Administration. See Pennsylvania Rules of Judicial Administration, Pa. Rules of Court 1 (West, 1980). The Administrator is not responsible for the judicial conduct of district justices. General supervision and administrative control over district justices has been delegated by the Supreme Court of Pennsylvania to the president judges of the courts of common pleas of each county. Rule 17 of the Pennsylvania Rules Governing Standards of Conduct of Justices of the Peace, supra n. 17. Under these circumstances, there is no rational basis on which to impose fees in this case on any governmental units

or officials as surrogates for the district justices.

Moreover, an award of attorneys' fees in this case against any governmental units or officials would not comport with the requirements of due process because none of them was provided with notice or an opportunity to be heard. It goes without saying that notice to the district justices is not equivalent to notice to the Commonwealth of Pennsylvania. Similarly, notice to the district justices' attorneys that a motion to assess fees has been filed is not equivalent to notice to the administrators by whom the attorneys are regularly employed; the existence of the employer-employee relationship was purely fortuitous.

The requirements of due process are fundamental. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or

property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). A State or state agency or subdivision, no less than an individual, is entitled to these minimum requirements. The instant record is barren of any suggestion that a claim for fees was being asserted against the State Court Administrator, the Commonwealth of Pennsylvania, the Beaver County Court Administrator or Beaver County, or that any of them has had an opportunity to be heard.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

/s/ Thomas W. Pomeroy, Jr.
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Attorney for Petitioners

October 15, 1980

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1923

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated.

Appellants

v.

JOHN J. AYOOB, HUGO R. IOFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH J. LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 78-0267)

Argued February 20, 1980*

Before: SEITZ, *Chief Judge*, VAN DUSEN, *Circuit Judge*, and SHAPIRO, *District Judge***

(Filed July 29, 1980)

Thomas C. Reed (Argued)
John Dineen
Neighborhood Legal Services Association
Pittsburgh, Pa. 15219
Counsel for Appellants

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* This determination was deferred pending the Supreme Court's resolution of *Supreme Court of Virginia v. Consumers Union*, 100 S. Ct. 1967 (1980), because the decision there appealed considered issues presented here.

** Hon. Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Thomas W. Pomeroy, Jr. (Argued)
Ronald S. Krasnow
Kirkpatrick, Lockhart,
Johnson & Hutchison
Pittsburgh, Pa. 15222
Counsel for Appellees

OPINION OF THE COURT

PER CURIAM:

The plaintiffs appeal from an order of the district court denying their request for attorney's fees under 42 U.S.C. §1988.

I.

Plaintiffs are a class of indigents residing in Beaver County, Pennsylvania. The defendants are district justices for the county (formerly known as district magistrates). District justices are elected judicial officials, and their jurisdiction includes mainly minor civil matters and petty and/or summary criminal matters. *See* Pa. Cons. Stat. Ann. tit. 42, §1515.

In March of 1978, the plaintiffs brought this action for declaratory and injunctive relief against the defendants in their official and individual capacities. Plaintiffs challenged the defendants' alleged practice of sending convicted indigents to jail for summary or petty offenses without first affording a right to counsel where *Argersinger v. Hamlin*, 407 U.S. 25 (1972), so requires. After the action was filed, the plaintiffs' counsel had several meetings with defendants' counsel at the Beaver County court house. Although the record is not entirely clear on the point, it appears that the solicitor for the county court administrator and a representative from the state court administrator attended at least some of these meetings.

The plaintiffs' counsel testified without dispute that some time after the action was filed, the President Judge of the Beaver County Court of Common Pleas sent a letter to the defendants through the county court administrator's office instructing them to comply with *Argersinger*. There is no copy of this letter in the record. In addition, in an unrelated case in which an appeal was taken from a sentence imposed by one of the defendants, the common pleas court held that *Argersinger* had been violated.

While this action was pending, the defendants on the whole began to comply with *Argersinger*. Thereafter, the defendants moved to dismiss the case as moot. The plaintiffs did not oppose the motion, and the district court granted it.

The plaintiffs then moved for attorney's fees pursuant to 42 U.S.C. §1988. The district court denied the motion, reasoning that although the plaintiffs were prevailing parties, the defendants, as judges, were entitled to an immunity defense both in their individual and official capacities. This appeal followed.

II.

At the outset, the defendants challenge the district court's conclusion that the plaintiffs are prevailing parties within the meaning of §1988. Although the district court was rather brief in this regard, we believe that, given the record in this case, its conclusion was correct. In this circuit, the test of whether a person is a prevailing party is whether he "essentially succeeds in obtaining the relief he seeks in his claims on the merits." *Bagby v. Beal*, 606 F.2d 411, 415 (3d Cir. 1979).

Here, the district court necessarily concluded that the defendants had been violating *Argersinger* prior to this action and stopped after the action was filed. Indeed, it was hard for the court to conclude otherwise. The only evidence of record on the point is that of plaintiff's counsel, who testified that he had investigated the

matter and found violations before the action was filed but few after. The defendants introduced no testimony to contradict this. The district court thus was not clearly erroneous in concluding that the defendants had been violating *Argersinger* prior to the institution of this action and stopped afterwards.

Because the defendants stopped violating *Argersinger*, the plaintiffs received precisely the relief they wanted. Moreover, the fact that the action was dismissed makes no difference. Under §1988 the focus is on the relief received rather than any formal procedural labels. *See Bagby, supra*, 606 F.2d at 414-15; *Ross v. Horn*, 598 F.2d 1312, 1322 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3846 (1980).

Defendants contend, however, that the cause of their cessation of conduct was not the filing of this action. It is true that there must be a causal relationship between the action and the ultimate relief received for a person to be a prevailing party under §1988. *See Ross, supra*, 598 F.2d at 1322. Nevertheless, the action need not be the sole cause. Where there is more than one cause, the plaintiff is a prevailing party if the action was a material factor in bringing about the defendant's action. To hold otherwise would be inconsistent with the broad remedial purpose of §1988 because in many cases causation will hinge on the defendant's motivation. To require some stricter standard of causation would mean that the defendant could hide his true motivation behind what seems a plausible alternate justification.

Here, the defendants argue that this action played no part in their actions. They point to the letter sent by the president judge and the ruling of a common pleas judge that *Argersinger* had been violated in a particular case by one of the defendants. Because there apparently was no contact between plaintiffs' counsel and the president judge and because the ruling was in a separate judicial proceeding, they argue that the letter and the ruling were the sole reason they began to comply with *Argersinger*.

The defendants have failed to provide an adequate record basis for their contention. Even assuming the president judge's letter and the other judge's ruling had absolutely no connection with this action, the district court's necessary conclusion that the action was a material factor was not clearly erroneous. The plaintiffs' counsel, the only witness, testified that he communicated with some of the defendants informally prior to filing of this action. After this action was filed, counsel for both sides met and discussed the case.

This sequence of events strongly suggests that the action was a material factor in bringing about the defendants' change in conduct. Even though the defendants knew about possible violations of *Argersinger* through informal communications, they did not stop violating the case until after the action was filed and their counsel discussed the case with plaintiffs' counsel. On this record, we cannot say that the district court was clearly erroneous.[1]

Because the plaintiffs received the relief they requested and because the record supports a finding that this action was a material factor in the defendants' decision to cease the complained of conduct, we conclude that the district court was correct in holding that the plaintiffs are prevailing parties under §1988.

III.

On appeal, the plaintiffs seek attorney's fees from the defendants only in their official capacities. Thus we do not consider whether such an award would be appro-

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1. The defendants' argument on appeal as to causation is somewhat disingenuous. For example, the motion to dismiss in the district court referred to the case as being "settled." Moreover in another section of their brief on appeal urging affirmance for other reasons, they state: "Once the problem was brought to the attention of the Pennsylvania Court Administrators office and the local court administrators office, both of these offices helped the plaintiffs to obtain the relief sought."

priate from the defendants in their individual capacities. Moreover, contrary to some suggestions in the briefs, the eleventh amendment is not a bar to an award of attorney's fees under §1988. *See Hutto v. Finney*, 437 U.S. 678, 689-700 (1978). Thus the question presented is whether the doctrine of judicial immunity bars recovery of attorney's fees by a prevailing party under §1988 from judicial officers in their official capacity. We hold that it does not.[2]

The doctrine of judicial immunity is a common-law rule, and the Supreme Court has indicated that Congress may abolish the doctrine when it sees fit. *See Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). We believe that Congress has done so in §1988.

The legislative history of §1988 indicates that Congress expressly considered judcial immunity and decided to abrogate it under §1988. The House Report states:

> Furthermore, while damages are theoretically available under the statutes covered by [§1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

H. Rep. No. 94-1558, 94th Cong., 2nd Sess. 9 (1976). Footnote 17 contains a citation to *Pierson v. Ray*, 386 U.S. 547 (1967), the case where the Supreme Court in-

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2. A three-judge court reached the same conclusion in *Consumers Union v. Supreme Court of Virginia*, 470 F. Supp. 1033 (E.D. Va. 1979). On appeal, the Supreme Court reversed, holding that the state supreme court had been acting in a legislative capacity. The Court expressly did not reach the issue presented here. *See Supreme Court of Virginia v. Consumers Union*, 100 S. Ct. 1967, 1977-78 (1980).

dicated that Congress could abrogate judicial immunity. *See generally Supreme Court of Virginia v. Consumers Union*, 100 S. Ct. 1967, 1977-78 (1980). We believe that this is sufficient indication that Congress has exercised the choice left to it by *Pierson* by enacting §1988.

None of the defendants' arguments convince us to the contrary. First, they point out that because the plaintiffs' counsel are from a neighborhood legal services office funded with public money, the effect of attorney's fees here would be a rebudgeting of state funds by the federal judiciary.

To the extent this argument is founded on the eleventh amendment, as noted above, *Hutto, supra*, provides the dispositive answer. In addition, in *Rodriguez v. Taylor*, 569 F.2d 1231, 1244-46 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), we held that a public interest law firm could recover attorney's fees from the City of Philadelphia under the Fair Labor Standards Act. The defendants have suggested no convincing distinction between that case and this one, and we perceive none.

Finally, the defendants argue that there are insufficient funds to meet the amount of fees involved. The district court apparently accepted this argument because it stated that the budgets of the individual defendants' offices were insufficient to satisfy any award. Implicit in this statement is the premise that the award could be satisfied only from the individual budget of the office of each defendant.

Such, however, is not the case. "[W]hether or not state agencies are named as defendants in a §1983 action, [§1988] contemplates that the prevailing plaintiff may recover fees from the individual defendants in their official capacities or directly from the state agencies." *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 796 (3d Cir. 1978). *See Hutto, supra*, 437 U.S. 699-700.

Here, as in *Hutto* and *Skehan*, there are several possibilities as to how the award could be framed. For exam-

ple. both the county and the state court administrator arguably could be responsible for the award. Both entered appearances in the district court and actively participated in all phases of the case. factors found to be relevant in *Hutto* in framing an award. *See* 437 U.S. at 699. The plaintiffs and the defendants have made numerous arguments concerning how the award should be framed. Because the district court proceeded on an erroneous legal premise as to how the award might be framed. we feel it would be better for the district court to consider these arguments in the first instance.

We hold that judicial immunity is not a factor to be considered under §1988. We will remand to the district court to consider in the first instance the proper framing of the award of attorney's fees. We also note that the parties have stipulated the amount of fees and have raised no issue concerning this on appeal. We leave to the district court whether it nevertheless desires to amplify the record to determine the reasonableness of the fee. We also leave open whether the plaintiffs may recover fees in connection with this appeal.

IV.

The order of the district court will be reversed and remanded.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PATRICIA MORRISON, et al	)	
v.	)	Civil Action No. 78-267
JOHN AYOOB, et al	)	

Dated: May 24 , 1979.

MEMORANDUMN OPINION RE: COUNSEL FEES

This action was brought by plaintiffs on behalf of themselves and others as a class action complaining that the defendants who are district justices or magistrates in Beaver County, Pennsylvania have been depriving people of their rights to counsel under Argersinger v. Hamlin, 407 US 25 (1972). It is alleged that notwithstanding the decision of the U.S.Supreme Court, the justices have been jailing people in minor and summary offenses without the benefit of counsel as required by the Supreme Court. It would appear also that the actions of the justices if true would be in violation of Pennsylvania Rules of Criminal Procedure No. 65, 315, 316 and 318 which are appeared to be tailored to meet the requirements of Argersinger.

The case progressed to the point where the Administrative Office of the Courts in Beaver County and the President Judge thereof admonished the district justices that they had to comply with the requirements of the Pennsylvania Supreme Court and with the requirements of Argersinger and the practices thereupon ceased with one alleged exception. It appearing that there was at that time no need for further action, either for declaratory

or injunctive relief by this court,which was the relief sought, with the consent of the plaintiffs, the court dismissed the action as moot the plaintiffs only consenting to dismissing for mootness.

Plaintiff's counsel being the Neighborhood Legal Services of Aliquippa,Pennsylvania in Beaver County, then presented a motion for costs and attorneys fees pursuant to 42 USC 1988 as amended by the Act of October 19, 1976 which insofar as is relevant here reads as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal REvenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The court has no hesitation in holding that the plaintiffs were prevailing parties in this case and as such are entitled to fees since as the result of action taken by them their purpose, being to secure compliance with Argersinger,what they sought was accomplished. The mere fact the case has been settled or dismissed does not preclude an award where vindication of the rights sought has been obtained. Gagne v. Mahr, 47 LW 2615 (2d cir 1979). The question is:has the suit served as a catalyst for accomplishing the desired result? Was the major objective of the suit accomplished? Fluhr v. Roberts, 463 FS 745 (W.D. Ky 1979). We therefore hold that the plaintiffs are prevailing parties.

It should be noted that there is no dispute as to the amount of attorney's fees. It was agreed by the parties at argument that the amount of $4420 was a fair amount to be

allowed for counsel fees plus $158.45 for a total of $4578.45 which was agreed to be the proper amount if any was to be awarded.

The remaining question,however,is of greater importance. The defendants were all district justices formerly known as justices of the peace in the Pennsylvania Judicial System. As such they would ordinarily be entitled to Judicial Immunity under Pierson v. Ray, 386 US 547 (1967); Stump v. Sparkman,435 US 349; Pennebaker v. Chamber, 437 F 2d 66 (3d cir 1971).

It has been held that the counsel fees section of section 1988 does apply even as against state departments and officials where the money should be paid out of funds available to the department of institution. See Hutto v. Finney, US , 57 L Ed 2d 522 holding that in a case involving prison conditions where there was a justifiable finding of bad faith, the award of attorneys fees to be paid out the state Department of Correction funds was not barred by the Eleventh Amendment. It was pointed out that the Eleventh Amendment does not prevent award of attorneys fees against officers in their official capacities. See Fitzpatrick v. Bister, 427 US 445.

We also have the Third Circuit case which we are bound to follow Skehan v. Board of Trustees of Bloomsburg State College 590 F2d 470 (3d cir December 21, 1978) holding that claims for monetary damages for back pay by a college professor who claimed discrimination should not be allowed against the college under the Eleventh amendment nor against the president thereof who was entitled to official immunity. The Skean case holds that absent a finding that individual defendants had litigated in bad faith, they would not be liable to a fee award under 1988 and the Court of Appeals

quoted from Hutto that it was manifestly unfair where individual officers have no personal interest in the conduct of the litigation to impose personal liability on them for counsel fees in the absence of bad faith because this may cause the state officers to exercise their discretion with undue timidity.

None of these cases however approaches the problem of judicia immunity. Under Pierson v. Ray and Stump v. Sparkman we hold that whether the act be regarded as performed by the district justices in their individuals capacities that no counsel fees should be awarded against them. If the costs were to be awarded against them in their official capacities it does not appear that there is any fund from which they are to be paid. An individual district justice has no funds outside those derived from payment of costs and fees pertaining to his office. Insofar as the court has been informed in this case there is no general fund for operating the state minor judicial system.)

In Universal Amusement Co. v. Vance, 559 F 2d 1286 (5th cir 1977) involving seizure of an allegedly obscene motion picture film by a county prosecutor and chief of police, it was held the Congress did intend when enacting 1988 in its present form to lift the veil of immunity from state and local governments but if the fees awarded are against persons in their individual capacities, then the court must respect the absolute immunity from money damages enjoyed by prosecutors under Imbler v. Pachtmar 424 US 409 (1976).)

It is noted that 1988 says: "that the court in its discretion may allow the prevailing party". In other words, it is obvious that the court has discretion and is not required to award counsel fees. We hold in this case that discretion

should be exercised not to award counsel fees against members of the state judicial system who have no funds from which to pay it other than funds of their office, that to do so would undermine the whole reasoning against judicial immunity and inhibit them in the exercise of their official functions as judges for fear of possible payment of counsel fees and possible lawsuits.

For these reasons we will deny the motion for counsel fees. This still leaves open the question of whether the case should be reopened as to defendant Ayoob. Except as to him, we find there was no bad faith on the defendant's part and as to Ayoob the matter is not as yet clear.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PATRICIA MORRISON, et al	)	
v.	)	Civil Action No. 78-267
JOHN AYOOB, et al	)	

ORDER

AND NOW, to wit, May , 1979, for reasons set forth in the foregoing memorandum opinion,

IT IS ORDERED that plaintiff's motion for counsel fees be and the same hereby is denied.

U.S.District Judge

CC:

John Dineen, Esq. 266 Franklin Ave Aliquippa 15001

Jonathan Vipond, Esq. 1414 Three Penn Center Plaza Phila 19102

David Brakoniecki, Esq. 812 City County Bldg 15219

Robert Taylor, Esq. 337 Merchant St Ambridge 15003

Beaver County Court Administrators Beaver County 15009

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Const. art. 4, §4 provides:

> Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when Legislature cannot be convened) against domestic Violence.

U. S. Const. amend. XI provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. §1291(1966) provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

29 U.S.C. §216(b) (1970) provides in pertinent part:

> The court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant. . . .

29 U.S.C. §626(b) (1975) provides in pertinent part:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section.

42 U.S.C. §2809 (1973) provides in pertinent part:

> (a) In order to stimulate actions to meet or deal with particularly critical needs or problems of the poor which are common to a number of communities, the Director may develop and carry on special programs under this section . . . . Programs under this section shall include those described in the following paragraphs:
>
> * * * *

(3) A "Legal Services" program to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, legal counseling, education in legal matters, and other appropriate legal services.

42 U.S.C. §1983 (Supp. 1980) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988 (Supp. 1980) provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for

the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pa. Const. art. V, §1 provides:

> The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Pa. Const. art V. §10 provides in pertinent part:

> (b) The Supreme Court shall appoint a court administrator and may appoint such subordinate administrators and staff as may be necessary and proper for the prompt and proper disposition of the business of all courts and justices of the peace.

Pa. Const. art V, §18 provides:

> (a) There shall be a Judicial Inquiry and Review Board having nine members as follows: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.

(b) The members shall serve for terms of four years, provided that a member, rather than his successor, shall continue to participate in any hearing in progress at the end of his term. A vacancy on the board shall be filled by the respective appointing authority for the balance of the term. The respective appointing authority may remove a member only for cause. No member shall serve more than four consecutive years; he may be reappointed after a lapse of one year. Annually the members of the board shall elect a chairman. The board shall act only with the concurrence of a majority of its members.

(c) A member shall not hold office in a political party or political organization. Members, other than judges, shall be compensated for their services as the Supreme Court shall prescribe. All members shall be reimbursed for expenses necessarily incurred in the discharge of their official duties.

(d) Under the procedure prescribed herein, any justice or judge may be suspended, removed from office or otherwise disciplined for violation of section seventeen of this article, misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute and may be retired for disability seriously interfering with the performance of his duties.

(e) The board shall keep informed as to matters relating to grounds for suspension, removal, discipline, or compulsory retirement of justices or judges. It shall receive complaints or reports, formal or informal, from any source pertaining to such matters, and shall make such preliminary investigations as it deems necessary.

(f) The board, after such investigation, may order a hearing concerning the suspension, removal, discipline or compulsory retirement of a justice or judge. The board's orders for attendance of or testimony by witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings.

(g) If, after hearing, the board finds good cause therefor, it shall recommend to the Supreme Court the suspension, removal, discipline or compulsory retirement of the justice or judge.

(h) The Supreme Court shall review the record of the board's proceedings on the law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory retirement, or wholly reject the recommendation, as it finds just and proper. Upon an order for compulsory retirement, the justice or judge shall be retired with the same rights and privileges were he retired under section sixteen of this article. Upon an order for suspension or removal, the justice or

judge shall be suspended or removed from office, and his salary shall cease from the date of such order. All papers filed with and proceedings before the board shall be confidential but upon being filed by the board in the Supreme Court, the record shall lose its confidential character. The filing of papers with and the giving of testimony before the board shall be privileged.

(i) No justice or judge shall participate as a member of the board or of the Supreme Court in any proceeding involving his suspension, removal, discipline or compulsory retirement.

(j) The Supreme Court shall prescribe rules of procedure under this section.

(k) The Supreme Court shall prescribe rules of procedure for the suspension, removal, discipline and compulsory retirement of justices of the peace.

(l) A justice, judge or justice of the peace convicted of misbehavior in office by a court, disbarred as a member of the bar of the Supreme Court or removed under this section eighteen shall forfeit automatically his judicial office and thereafter be ineligible for judicial office.

(m) A justice or judge who shall file for nomination for or election to any public office other than a judicial office shall forfeit automatically his judicial office.

(n) This section is in addition to and not in substitution for the provisions for impeachment for misbehavior in office contained in article six. No justice, judge or justice of the peace against whom impeachment proceedings are pending in the Senate shall exercise any of the duties of his office until he has been acquitted.

42 Pa. C.S. §§1901-1903 provide:

§1901. The Supreme Court shall appoint and may remove a Court Administrator of Pennsylvania.

§1902. A reference in any statute to the Administrative Office of Pennsylvania Courts shall be deemed a reference to the Court Administrator of Pennsylvania who shall, either personally, by deputy, by other duly authorized personnel of the system, or by duly authorized agent, exercise the powers and perform the duties by statute vested in and imposed upon the Administrative Office.

§1903. The Supreme Court may appoint such subordinate administrators and staff as may be necessary and proper for the prompt and proper disposition of the business of all courts and district justices.

Pa. R. Crim. P. 65 provides:

(a) If a defendant, sentenced to pay a fine or costs after a finding of guilt in a summary case, defaults in such payments, the issuing authority shall not commit the defendant to prison for failure to pay a fine or costs unless, after hearing, it appears that the defendant is financially able to pay the fine or costs.

(b) When the issuing authority determines, after hearing, that the defendant is without the financial means to pay the fine or costs immediately or in a single remittance, the issuing authority may provide for payment of a fine or costs in such installments and over such period of time as he deems to be just and practicable, taking into account the financial resources of the defendant and the nature of the burden his payments will impose as set forth in paragraph (c) below.

(c) The issuing authority, in determining the amount and method of payment of the fine or costs, shall consider, insofar as it is just and practicable, the burden upon the defendant by reason of his financial means, including his ability to make restitution and reparations.

(d) In cases in which the issuing authority has ordered payment of a fine or costs in installments, the defendant may request a rehearing on his payment schedule when he is in default of a payment or when he advises the issuing authority that such default is imminent. At such hearing, the

burden shall be on the defendant to prove his financial condition has deteriorated to the extent that he is without the means to meet the payment schedule. Thereupon the issuing authority may extend or accelerate the payment schedule or leave it unaltered, as the issuing authority finds to be just and practicable under the circumstances. When there has been a default and the issuing authority finds the defendant is not indigent, he may impose imprisonment, as provided by law, for nonpayment.

(e) Whenever an issuing authority sentences a defendant to pay a fine or the costs or both in a summary proceeding commenced by issuance of a citation, and the defendant is not then physically present, the issuing authority shall issue a warrant for the arrest of the defendant:

(a) when a plea of guilty has been entered, and the amount of fine or costs or both forwarded to the issuing authority does not satisfy the terms of the sentence; or

(b) if an amount posted as security for trial does not satisfy the terms of the sentence.

(f) The warrant shall set forth the amount required to satisfy the fines and costs.

(g) Upon execution of a warrant under this Rule, the police officer shall take the defendant before the

issuing authority named in the warrant who shall proceed as specified in paragraphs (a), (b), and (c) of this Rule.

(h) A police officer, when executing a warrant issued under this Rule may, in lieu of taking the defendant before the issuing authority, accept full satisfaction in the form of a certified check, money order or personal check payable to the issuing authority for the fine and costs imposed which he shall thereupon transmit to the issuing authority named in the warrant.

Pa. R. Crim. P. 316 provides:

(a) In Summary Cases

Counsel shall be assigned in all summary cases to all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a likelihood that imprisonment will be imposed.

(b) In Court Cases

In all court cases counsel shall be assigned prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel.

(c) In all Cases

(i) The court, of its own motion, shall assign counsel

to represent a defendant whenever the interests of justice require it.

(ii) A motion for change of counsel by a defendant to whom counsel has been assigned, shall not be granted except for substantial reasons.

(iii) Where counsel has been assigned, such assignment shall be effective until final judgment, including any proceedings upon direct appeal.

Pa. R. Crim. P. 318 provides:

(a) GENERALLY. The defendant may waive the right to be represented by counsel.

(b) PROCEEDINGS BEFORE AN ISSUING AUTHORITY. When the defendant seeks to waive the right to counsel in a summary case or for a preliminary hearing in a court case, the issuing authority shall ascertain from the defendant whether this is a knowing, voluntary and intelligent waiver of counsel. In addition, the waiver shall be in writing, signed by the defendant and the issuing authority, be made a part of the record and be in the following form:

WAIVER OF COUNSEL

I, _____, have been
(name of defendant)
told that I have the right to have a lawyer represent me, and the right to have a free lawyer appointed to represent me without cost to me

if I cannot afford to pay a lawyer. I give up these rights and I choose to act as my own lawyer at this hearing/trial.

_____
Defendant

_____
Date

I have determined that the defendant has made a knowing, voluntary and intelligent waiver of his right to counsel.

_____
Issuing Authority

(c) PROCEEDINGS BEFORE A JUDGE. When the defendant seeks to waive the right to counsel after the preliminary hearing, the judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary and intelligent waiver of counsel.

(d) STANDBY COUNSEL. When the defendant's waiver of counsel is accepted, standby counsel may be appointed for the defendant. Standby counsel shall attend the proceedings and shall be available to the defendant for consultation and advice.

Rule 17 of the Rules Governing Standards of Conduct of Justices of the Peace, 450 Pa. xxix (1969), Desk Copy, Pa. Rules of Court 59, 74 (West, 1980) provides:

> The president judge of the court of common pleas of a judicial district shall

exercise general supervision and administrative control over justices of the peace and constables within his judicial district.

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG, PA. 17120

ROBERT P. KANE
ATTORNEY GENERAL

February 24, 1975

COURT ADMINISTRATOR OF PENNSYLVANIA
RECEIVED
FEB 25 1975

Honorable Alexander F. Barbieri
Court Administrator of Pennsylvania
Administrative Office of Pennsylvania Courts
317 Three Penn Center Plaza
Philadelphia, Pennsylvania 19102

Dear Judge Barbieri:

In the past the Department of Justice, when requested to do so, has represented members of the judicial branch of the government of the Commonwealth in litigation to which they have been parties. The basis of this policy has been the Administrative Code, 71 P.S. § 293(b), which requires the Attorney General to "represent the Commonwealth, or any department . . . board, commission or officer thereof, in any litigation to which the Commonwealth or such department, board, commission or officer, may be a party or in which the Commonwealth or such department, board, commission or officer, is permitted or required by law to intervene or interplead." After reconsidering this policy, it is our opinion, and you are so advised, that the judicial branch is not such a department, board or commission of the Commonwealth as is contemplated by the statute and, further, that members of the judiciary are not such officers as are within the statutory language. It is our opinion that any other interpretation of the statute would violate the Constitutional principle of separation of powers and, that, therefore, our prior practice of representing the judicial branch and members thereof in litigation must be discontinued.

Under our Constitution, the powers of the government are divided between three independent co-ordinate branches: the legislature, the executive and the judiciary. The Supreme Court of Pennsylvania has made it clear that the principle of separation of powers was established to maintain and protect the independence of the three branches. In a discussion of the Constitutional provisions referring to the compensation of judges it said:

> "They are independent and co-ordinate, because distinct rights, powers and privileges are

ATTORNEY GENERAL FILE

assigned to them by the Constitution. Each is entitled to the free, unbiased, uninfluenced and independent exercise of all their rights, powers and privileges in as ample extent as the Constitution allows." Commonwealth v. Mann, 5 W & S 403, 407 (1843), Accord, Commonwealth v. Mathues, 210 Pa. 372 (1904).

That Court has also observed that:

"in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will have the least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over the sword or the purse; no direction of either the strength or of the wealth of the society, and can take no active resolution whatever. It can be truly said to have neither force nor will, but merely judgment, and to be ultimately dependent upon the executive arm for the efficacious exercise even of this facility. This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two, and that all possible care is requisite to enable it to defend itself against their attacks . . . .

. . . liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; . . . the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; . . . from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches . . . . The complete

> independence of the judiciary is a fundamental principle of the Constitution, designed mainly for the protection of public and private rights . . . ." Commonwealth v. Mann, supra at 480-11.

In Mathues, relying in substantial part on the Mann holding, the Supreme Court of Pennsylvania held that members of the judicial branch were not "public officers" within the meaning of the term as used in a Constitutional provision barring an increase in the salary of such officers during their terms of office, concluding that to hold otherwise would violate a specific provision of the Constitution guaranteeing the judges "adequate compensation" and, more importantly, the general Constitutional principle of separation of powers which, according to the Mann decision, that provision was intended to protect. Commonwealth v. Mathues, supra.

It is our opinion that this same Constitutional theory of separation of powers excludes members of the judicial branch from the coverage of 71 P.S. § 293(b) as it is a theory which requires the existence of a certain tension between the separate branches of government which the legal representation of one branch by another tends to eliminate. Such a relationship of dependency by one branch on another creates just that possibility of influence of which the Court spoke in Mann.

In saying this, we do not mean to indicate that this relationship has been or will be improperly used. However, as the Supreme Court noted in Mann, it is not intentional disrespect to either the judicial or executive branches of government to suppose it possible that cases may arise where successful resort may be had to the potential lever of influence in order to accomplish executive goals. See, Commonwealth v. Mann, supra at 409. It is this very potential for conflict and influence which, in itself, violates the Constitutional doctrine of separation of powers and which must, therefore, be eliminated.

In passing we should also note that the Department of Justice and agencies whose legal matters it controls employ over 350 attorneys who are involved in litigation in all the courts of the Commonwealth on a continuing basis; thus, the possibility that the Department might be representing a judge in litigation to which he is a party and at the same time be involved in litigation before him is not insubstantial. This potential conflict of interest, while apparently not explicitly barred by the Canons of Ethics, borders on the improper and may, in itself, justify the termination of any representation of judges by the Department of Justice.

Accordingly, you are hereby advised that the Department of Justice will no longer represent in litigation either individual judges or the judiciary itself. In this regard, we believe, and

you are so advised, that under Article V, Section 10(b) of the Constitution of the Commonwealth of Pennsylvania you, as Court Administrator, have the power to hire an attorney or attorneys to represent the judiciary which would be independent of the control of either the executive or legislative branches of government.

Very truly yours,

Allen C. Warshaw
Deputy Attorney General

Vincent X Yakowicz
Solicitor General

Robert P. Kane
Attorney General

OFFICIAL OPINION NO. 75-9

Court Administrator-- Representation of State Judicial Officers By the Department of Justice - Separation of Powers

1. The Judicial Branch is not a department, board or commission of the Commonwealth within the meaning of Section 903 of the Administrative Code, 71 P.S. § 293.

2. The Constitutional doctrine of separation of powers requires that the total independence of each of the three branches of government be protected and maintained.

3. Representation of state judicial officers by the Department of Justice violates the constitutional doctrine of separation of powers.

4. The Court Administrator of Pennsylvania has authority under Article V, Section 10(b) of the Constitution of the Commonwealth of Pennsylvania to hire attorneys to represent the judiciary.

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 1980, three copies of the within Petition for Writ of Certiorari were mailed, postage prepaid, to Timothy P. O'Brien, Esquire, counsel for Respondents, Neighborhood Legal Services Association, 10th Floor, Allegheny Building, 429 Forbes Avenue, Pittsburgh, Pennsylvania 15219. I hereby further certify that all parties required to be served have been served.

/s/ Thomas W. Pomeroy, Jr.
Thomas W. Pomeroy, Jr., Esquire
Kirkpatrick, Lockhart,
Johnson & Hutchison
1500 Oliver Building
Pittsburgh, Penna. 15222

Attorney for Petitioners

October 15, 1980